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(6)

No. 98-818

Supreme Court, U.S.
FILED
MAY 27 1999
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO,
GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* CENTER FOR EQUAL OPPORTUNITY, NEW YORK CIVIL RIGHTS COALITION, CARL COHEN, AND ABIGAIL THERNSTROM IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Fourteenth and Fifteenth Amendments to the United States Constitution permit the adoption of an explicit racial classification that restricts the right to vote in statewide elections for state officials.

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INTEREST OF AMICI CURIAE[1]

The Center for Equal Opportunity is a non-profit organization dedicated to the idea that America should be one nation and that citizens of all races, colors, and ethnicities

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than the amici curiae and counsel made a monetary contribution to the preparation or submission of this brief. *See id.*

should be treated equally. The New York Civil Rights Coalition is a non-profit organization seeking to achieve a society where the individual enjoys the blessings of liberty free from racial prejudice, stigma, caste, or discrimination. Carl Cohen is a Professor of Philosophy at the University of Michigan, has served for many years in the leadership of the American Civil Liberties Union, and is the author of *Naked Racial Preference* (1995). Abigail Thernstrom is the co-author of *America in Black and White: One Nation, Indivisible* (1997) and the author of *Whose Votes Count? Affirmative Action and Minority Voting Rights* (1987). Amici submit that the Fourteenth and Fifteenth Amendments prohibit Hawaii's racial voting qualification.

SUMMARY OF ARGUMENT

The Fifteenth Amendment to the United States Constitution provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Amendment, by its language and history, applies to all state elections.

Notwithstanding the clear language of the Fifteenth Amendment, Hawaii determines a citizen's qualifications to vote in elections for the Office of Hawaiian Affairs *solely on the basis of the citizen's race*. Hawaii's racial voting qualification is a clear violation of the Fifteenth Amendment, and that violation alone requires reversal of the decision of the court of appeals.

The racial voting qualification also violates the Equal Protection Clause of the Fourteenth Amendment. This Court's cases establish that the Equal Protection Clause prohibits racial classifications except when such classifications are necessary and narrowly tailored to serve a compelling government interest.

Outside of an immediate threat to life or limb, as in a prison race riot, a compelling government interest exists only when the government has imposed the racial classification as a remedy for past, identified discrimination in that jurisdiction and field (such as discrimination in the schools in a particular jurisdiction). Hawaii has not shown or attempted to show that its racial voting qualification in elections for the Office of Hawaiian Affairs is designed to remedy past discrimination in voting against "Hawaiians" in Hawaii.

In any event, even assuming such past discrimination, a racial qualification to *vote* has never been held necessary and narrowly tailored to remedy past discrimination. Moreover, this racial voting qualification is not narrowly tailored in scope: It is a strict racial qualification that *categorically* excludes members of certain racial groups (all but "Hawaiians") from the ballot in elections for the Office of Hawaiian Affairs — including members of racial groups historically discriminated against in the United States and in Hawaii. Nor is the racial qualification narrowly tailored in duration: Hawaii established the racial classification in 1978, and it has no termination date.

Hawaii has explained that Hawaiians share a common heritage and background that they, like many Americans of all backgrounds, cherish and celebrate. But a state has no right to engage in racial classifications on the right to vote in a state election simply to preserve a particular culture. This Court has forbidden analogous "cultural" justifications for racial classifications in cases ranging from *Brown v. Board of Education* to *Loving v. Virginia*.

Finally, Hawaii's attempt to end-run the Equal Protection Clause by analogizing "Hawaiians" to American Indian tribes is entirely unavailing. As this Court repeatedly has held, differential treatment of Indian tribes *as tribes* is justified by the Constitution's specific reference to Indian tribes as separate sovereigns. The Constitution does not contain a Hawaiian

Commerce Clause, and Hawaiians do not and could not qualify as an American Indian tribe.

ARGUMENT

INTRODUCTION

Hawaii determines a citizen's qualifications to vote in state elections for the Office of Hawaiian Affairs *on the basis of the citizen's race*. As is clear from that introductory sentence alone, Hawaii's racial restriction on voting is a patent violation of the United States Constitution. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Loving v. Virginia*, 388 U.S. 1 (1967); *Anderson v. Martin*, 375 U.S. 399 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Guinn v. United States*, 238 U.S. 347 (1915).[2]

Two provisions of law provide the backdrop for this controversy: the federal Admission Act of 1959 and the Hawaii Constitution, as amended in 1978. The Admission Act, enacted by Congress at the time of Hawaii's admission to the Union, ceded to the State approximately 1,800,000 acres of land that the United States had owned since 1898. The Admission Act restricted the State's use of land to five purposes: (1) support of public schools; (2) betterment of the conditions of native Hawaiians; (3) development of farm and home ownership on as widespread a basis as possible; (4) making of public improvements; and (5) provision of lands for public use. Admission Act of March 18, 1959, 73 Stat. 4, § 5(f).

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[2] We will use the terms "race" and "racial" throughout this brief to encompass the overlapping concepts of race, ethnicity, ancestry, and national origin, as government distinctions based on such characteristics are subject to the same stringent constitutional scrutiny. *See Oyama v. California*, 332 U.S. 633, 646 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). We will adopt the convention of state law and use the term "Hawaiian" to refer to those whose ancestors were Hawaiian. For purposes of our brief, there is no need to further distinguish by blood amount between "Hawaiians" and "native Hawaiians," although state law does so.

The Admission Act further provided that "[s]uch lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide." *Id.* The Act thereby permitted the State to use those lands in a race-neutral way and/or for the benefit of *all* citizens of Hawaii. Indeed, that is precisely how the State administered the lands from 1959 to 1978 when the State used money from the lands on a race-neutral basis primarily for state educational purposes. Pet. App. 5a.[3]

In 1978, however, Hawaii dramatically changed course. The State enacted a constitutional amendment, *see* Haw. Const. art. xii, which along with a statute enacted shortly thereafter accomplished three things. *First*, the State required that 20% of the proceeds from the Admission Act lands be used solely to benefit certain native Hawaiians. *Id.*; Haw. Rev. Stat. §§ 10-3(1); 10-13.5. *Second*, the State created the Office of Hawaiian Affairs (OHA) to administer that 20% portion of the proceeds *and* to administer solely for the benefit of Hawaiians other monies received from general state funds. The OHA's officers must be Hawaiians. Haw. Const. art. xii. *Third*, the State imposed still another racial qualification, allowing only Hawaiians to vote in the OHA elections. Haw. Rev. Stat. § 13D-3(b) ("No person shall be eligible to register *as a voter* for the election of board members unless the person meets the following qualifications: (1) The person is Hawaiian . . . .").

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[3] A discrete block of 200,000 acres is administered by the State's Department of Hawaiian Home Lands pursuant to a separate statutory regime. A 1920 federal statute (the Hawaii Homes Commission Act, 42 Stat. 108) dealt with those lands by means of an express racial classification, albeit one that was not applied in the decades that followed. In any event, the HHCA program is not at issue here, although it also has serious constitutional problems to the extent that it relies on racial classifications.

The entire scheme is infused with explicit racial quotas, exclusions, and classifications to a degree this Court has rarely encountered in the last half-century. *See generally Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 730 (1994) (Kennedy, J., concurring in judgment). The scheme benefits one preferred racial class within the State of Hawaii to the exclusion of all others and creates collateral racial classifications that are unnecessary even to serve that (itself unconstitutional) purpose. The scheme is a clearcut and extensive violation of the Constitution: None of its three elements, particularly the voting qualification at issue here, is constitutional.

Under the State's theory, the State of Massachusetts could declare certain state funds in Massachusetts to be distributed for the benefit of Irish-Americans, establish an Office of Irish Affairs composed solely of Irish-Americans to administer the funds, and restrict the vote for that Office to those citizens of Massachusetts with Irish blood. The State of Florida could do the same for Cuban-Americans, the State of Wisconsin for German-Americans, the State of Texas for Mexican-Americans, and so on. As a matter of logic and of constitutional law, affirmance of the court of appeals decision could usher in an extraordinary racial patronage and spoils system.

Hawaii no doubt will label such concerns an exaggeration, suggesting that other states would not adopt such a scheme. But we do not possess so clear a crystal ball as to confidently predict how a state 10 or 25 or 50 years from now might utilize a decision in Hawaii's favor in this case. And ultimately the Court must consider what a ruling in Hawaii's favor would *authorize*. *See Morrison v. Olson*, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting). As Justice Jackson stated, "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that it sanctions such an order, the Court

for all time has validated the principle of racial discrimination . . . . The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu v. United States* 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

The aspect of the OHA program specifically at issue here is the racial voting qualification, which violates both the Fifteenth Amendment and the Fourteenth Amendment.

I. THE FIFTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS.

The Fifteenth Amendment to the Constitution, ratified in the wake of the Civil War on February 3, 1870, speaks clearly and definitively: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Amendment repaired the Constitution's original tolerance of racial restrictions on the right to vote and stands as a legal bulwark against the racial strife and ethnic balkanization that has troubled this country since its founding — and that to this day plagues this Nation and others around the globe. *See generally Holder v. Hall*, 512 U.S. 874, 894-95 (1994) (Thomas, J., concurring in judgment); *South Carolina v. Katzenbach*, 383 U.S. 301, 309-13 (1966).

Since 1978, however, the State of Hawaii has prohibited citizens of certain races, *because of their race*, from voting in elections for the Office of Hawaiian Affairs — a government office that controls and disburses a significant amount of state funds, formulates policy, and administers certain state lands. *See* Haw. Rev. Stat. § 13D-3(b) ("No person shall be eligible to register as a voter for the election of board members unless the person . . . is Hawaiian. . . ."). Hawaii excludes not just

Caucasians from voting in elections for the Office of Hawaiian Affairs, it turns away citizens who are African-Americans, Japanese-Americans, Chinese-Americans, and indeed members of all racial and ethnic groups except the preferred Hawaiians.

The primary question presented to this Court is whether Hawaii, by prohibiting individuals from voting in a state election *because of their race*, has violated the Fifteenth Amendment, which prohibits States from denying individuals the right to vote *because of their race*. To pose the question is to resolve the case. As this Court has stated, the Fifteenth Amendment is "unequivocal[]" and prohibits race-based voting qualifications (as well as facially race-neutral voting qualifications that are intended to harm members of a particular race). *Shaw v. Reno*, 509 U.S. 630, 639 (1993); *see City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980); *Gomillion*, 364 U.S. at 339; *Smith v. Allwright*, 321 U.S. 649, 657 (1944); *Guinn*, 238 U.S. at 347; *cf. Chisom v. Roemer*, 501 U.S. 380, 392 (1991) ("*every election in which registered electors are permitted to vote*" is covered under § 2 of Voting Rights Act of 1965, which enforces the Fifteenth Amendment) (quotation omitted; emphasis added).

Hawaii has offered an array of historical and policy considerations in support of its racial voting scheme, primarily based on preserving the culture of Hawaiians. But all such arguments are, for purposes of the Fifteenth Amendment, nothing but diversions. Hawaii restricts the right to vote in a state election based on a citizen's race, and the clear and unequivocal language of the Fifteenth Amendment flatly prohibits such state action.

What is perhaps most telling about the unconstitutionality of Hawaii's racial voting qualification is that in the nearly 130 years since the Fifteenth Amendment was ratified — troubled though those years have been with respect to racial relations and racially motivated voting devices — no State so far as we are aware has thought it permissible to enact into law a facial

racial qualification on the right to vote in any state election. Indeed, several States, no doubt recognizing that the language of the Fifteenth Amendment was clear and unequivocal, resorted instead to pretext and subterfuge to try to evade what all understood to be the meaning of the Fifteenth Amendment. *See Shaw*, 509 U.S. at 639-40 (describing various forms of "[o]stensibly race-neutral devices" used "to deprive black voters of the franchise"); *see Gomillion*, 364 U.S. at 341; *Guinn*, 238 U.S. at 364-65.

In light of the plain conflict between Hawaii's racial qualification for voting and the clear language of the Fifteenth Amendment, the question that comes to the fore in this case focuses on the court of appeals: How did it go so far astray? The court of appeals recognized, after all, that the voter qualification at issue here was "expressly racial" and "clearly racial on its face." Pet. App. 10a, 15a. The court also acknowledged that the Fifteenth Amendment "squarely prohibits racially-based denials of the right to vote." Pet. App. 15a (quoting Laurence H. Tribe, *American Constitutional Law* 335 n.2 (2d ed. 1988)).

The court explained, however, that "restricting voter eligibility to Hawaiians cannot be understood without reference to what the vote is for." Pet. App. 11a. The court concluded that a state could allow racial restrictions on the right to vote when the underlying state office was, in essence, devoted to distributing funds for the benefit of a racially restricted class. Pet. App. 15a. The court held that such a scheme "does not deny non-Hawaiians the right to vote *in any meaningful sense*." Pet. App. 15a (emphasis added). The court did not explain, however, from what source it derived a "meaningful sense" exception to the Fifteenth Amendment's ban on racial voting qualifications, nor did it say how voting in elections to a state office that, among other things, controls and spends substantial sums of state money is not "meaningful."

The court said that it found guidance in cases in which this Court has held that limited special-purpose elections are consistent with the right to vote that the Court has inferred from the Fourteenth Amendment. *See Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); *cf. Reynolds v. Sims*, 377 U.S. 533 (1964). But in relying on those cases, the court of appeals overlooked a critical point: Those cases did not deal with *racial* restrictions on the right to vote. The Fifteenth Amendment places voting qualifications based on race in a constitutionally different class from voting qualifications based on non-suspect characteristics. Thus, the Constitution does not expressly provide that all citizens in a jurisdiction can vote in all elections (a point confirmed by the *Salyer* case), but it expressly prohibits denial of the right to vote in any state election *on account of race*. *Cf. Powers v. Ohio*, 499 U.S. 400, 409 (1991) ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."); *Buchanan v. Warley*, 245 U.S. 60, 74-75, 82 (1917) (state can limit property rights, but cannot do so on the basis of race).

In sum, this Court's resolution of this case should be quite straightforward. Nearly 130 years after the Fifteenth Amendment's ratification, the State of Hawaii seeks the Court's blessing to strip an American citizen of his right to vote in a state election based on his race. The words of the Fifteenth Amendment mean what they say, however, and the Fifteenth Amendment thus flatly bars Hawaii's denial of the right to vote in a state election on account of race.

II. THE FOURTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS.

Hawaii's racial restriction on voting also violates the Equal Protection Clause of Section 1 of the Fourteenth Amendment.

A. Racial Classifications Are Presumptively Invalid and Subject to Strict Scrutiny Under the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment, also ratified in the wake of the Civil War on July 9, 1868, provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." While not phrased in the plain and crystalline terms of the Fifteenth Amendment, the "central purpose" of the amendment is "to prevent the States from purposefully discriminating between individuals *on the basis of race*." *Shaw*, 509 U.S. at 642 (emphasis added).[4]

To be sure, the Court has not as yet adopted the most stringent rule for analyzing racial classifications under the Equal Protection Clause — that "only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embedded in the Fourteenth Amendment that our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Croson*, 488 U.S.

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[4] *See Miller v. Johnson*, 515 U.S. 900, 904 (1995) ("central mandate is racial neutrality in governmental decisionmaking"); *Powers*, 499 U.S. at 415 (Fourteenth Amendment's mandate is that "race discrimination be eliminated from all official acts and proceedings of the State"); *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."); *Loving*, 388 U.S. at 10 ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) ("historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States"); *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880) ("What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States . . . .").

at 521 (Scalia, J., concurring in judgment) (quotation omitted).[5] The Court's decisions have nonetheless established that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). As a result, "all laws that classify citizens on the basis of race . . . are constitutionally suspect and must be strictly scrutinized." *Hunt v. Cromartie*, No. 98-85, 1999 WL 303677, at *4 (May 17, 1999); *see Adarand*, 515 U.S. at 235-36; *Shaw*, 509 U.S. at 642-43; *Croson*, 488 U.S. at 493-94 (plurality).

The Court has stressed that racial classifications must be strictly scrutinized because classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). They "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw*, 509 U.S. at 657. They "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts — their very worth as citizens — according to a criterion barred to the Government by history and the Constitution." *Miller*, 515 U.S. at 912 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting)). And they reflect "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from

[5] *See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring); *Fullilove v. Klutznick*, 448 U.S. 448, 522-23 (1980) (Stewart, J., joined by Rehnquist, J., dissenting); *Defunis v. Odegaard*, 416 U.S. 312, 343-44 (1974) (Douglas, J., dissenting); *McLaughlin*, 379 U.S. at 198 (Stewart, J., joined by Douglas, J., concurring); *Bell v. Maryland*, 378 U.S. 226, 287-88 (1964) (Goldberg, J., joined by Warren, C.J., concurring); *Hirabayashi v. United States*, 320 U.S. 81, 110-11 (1943) (Murphy, J., concurring); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

those of other citizens." *Johnson v. DeGrandy*, 512 U.S. 997, 1027 (1994) (Kennedy, J., concurring) (quotation omitted).[6]

Racial classifications are offensive to the Constitution for a more practical reason as well. There is no way to apply them without formal rules for deciding who is and is not a member of a given race and without some governing body to apply and enforce those rules. *Cf. Plessy*, 163 U.S. at 552. As Justice Stevens has emphasized, however, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove*, 448 U.S. at 535 n.5 (Stevens, J., dissenting). Justice Stevens thus stated in *Fullilove* that a "serious effort" to "define racial classes" must "study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935." *Id.*; *see also Metro Broadcasting*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (comparing racial set-aside to South African Population Registration Act). This case illustrates the point: The State of Hawaii has struggled mightily to define who exactly is a "Hawaiian," an enterprise that has led to a variety of conflicting definitions and generated numerous lawsuits.

Strict scrutiny under the Equal Protection Clause applies with particular force to racial classifications affecting the voting process. *See Shaw*, 509 U.S. at 644.[7] The Court has

[6] Strict scrutiny applies regardless of the race benefited or burdened because a "benign racial classification is a contradiction in terms," *Metro Broadcasting*, 497 U.S. at 609 (O'Connor, J., dissenting) (quotation omitted), and there is "no principled basis for deciding which groups would merit heightened judicial solicitude and which would not," *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 296 (1978) (Powell, J.). Strict scrutiny also applies, of course, even when the racial classification burdens or benefits the races equally. *Powers*, 499 U.S. at 410; *Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954).

[7] *See Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring); *see also City of Mobile*, 446 U.S. at 86 (Stevens, J., concurring in judgment) (*Gomillion*

(continued...)

stated that "[r]acial classifications *with respect to voting* carry particular dangers" – including "balkaniz[ing] us into competing racial factions." *Shaw*, 509 U.S. at 657 (emphasis added). "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." *Miller*, 515 U.S. at 911-12 (quotation omitted); *cf. Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986). As Judge Wisdom stated over a generation ago, "*If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth.*" *Anderson v. Martin*, 206 F. Supp. 700, 705 (E.D. La. 1962) (Wisdom, J., dissenting) (emphasis added), *rev'd*, 375 U.S. 399 (1964).[8]

B. The Equal Protection Clause Prohibits a Racial Classification Unless the Classification Is Necessary and Narrowly Tailored to Serve a Compelling Government Interest.

Hawaii's law facially discriminates on the basis of race in determining which voters are qualified to vote in elections for the Office of Hawaiian Affairs.[9] Because the intent, meaning, history, and policy of the Equal Protection Clause all suggest that the Constitution does not allow governmental racial

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[7] (...continued)
is "compelled by the Equal Protection Clause").

[8] The Justices who dissented in *Shaw* still would consider a "direct and outright deprivation of the right to vote" on account of race (as here) subject to the strictest scrutiny. *Shaw*, 509 U.S. at 659 (White, J., dissenting); *id.* at 682 (Souter, J., dissenting).

[9] When, as here, "the racial classification appears on the face of the statute," then "[n]o inquiry into legislative purpose is necessary" to determine whether the law is designed to harm members of a particular race. *Shaw*, 509 U.S. at 642; *see Hunt*, 1999 WL 303677; *cf. Washington v. Davis*, 426 U.S. 229 (1976).

classifications — or, at most, only rarely allows them — the Court has held that racial classifications such as Hawaii's racial voting qualification are "presumptively invalid" and subject to strict scrutiny under the Fourteenth Amendment, meaning that they can be upheld only if based upon an "extraordinary justification." *Feeney*, 442 U.S. at 272 (*quoted in Shaw*, 509 U.S. at 643-44). Under the strict scrutiny standard, racial classifications thus violate the Equal Protection Clause unless they are both necessary and narrowly tailored to serve a compelling state interest. *Shaw*, 509 U.S. at 643; *Croson*, 488 U.S. at 509 (plurality) (Only in the "*extreme case*" may "some form of narrowly tailored racial preference . . . be *necessary*.") (emphases added).[10]

These requirements impose a number of important barriers that a government entity must surmount before it may impose a racial classification. The rationale is simple: "If there is no duty to attempt . . . to measure the recovery by the wrong . . . our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a piece of the action for its members." *Croson*, 488 U.S. at 510-11 (plurality) (quoting *Fullilove*, 448 U.S. at 539 (Stevens, J., dissenting)). Taken together, as

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[10] *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (plurality); *id.* at 286 (O'Connor, J., concurring); *Palmore*, 466 U.S. at 432 (classifications must be "necessary" to accomplishment of "compelling governmental interest"); *Fullilove*, 448 U.S. at 496 (Powell, J., concurring) ("racial classification . . . is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest"); *Loving*, 388 U.S. at 11 (racial classifications, "if they are ever to be upheld, . . . must be shown to be necessary to the accomplishment of some permissible state objective"). In some cases, the Court has used the term "necessary"; in some cases, the Court has used the term "narrowly tailored"; and in some cases, the Court has used both terms. The Court's consistent analysis incorporates both ideas. The Court has made it clear, for example, that past discrimination does not justify a racial classification if race-neutral alternatives are available.

Justice Kennedy has pointed out, these stringent requirements explain why the strict scrutiny standard "operate[s] in a manner generally consistent with the imperative of race neutrality." *Croson*, 488 U.S. at 519 (Kennedy, J., concurring).

First, the government must show a compelling interest that justifies its racial classification. Except in situations where there is an imminent threat to life or limb (as in a prison race riot), racial classifications must be "strictly reserved for remedial settings." *Id.* at 494 (plurality); *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination."); *Wygant*, 476 U.S. at 274-76 (plurality). Furthermore, the bare desire to remedy *societal* discrimination is too "amorphous" a concept of injury to qualify as a "compelling interest." *Croson*, 488 U.S. at 497 (plurality) (quoting *Bakke*, 438 U.S. at 307 (Powell, J.)); *see also Wygant*, 476 U.S. at 274 (plurality) ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification."). In order for the government to show that the classification is truly remedial, the classification must be preceded by "judicial, legislative, or administrative findings of constitutional or statutory violations." *Croson*, 488 U.S. at 497 (plurality) (quoting *Bakke*, 438 U.S. at 308-09 (Powell, J.)).[11] In *Croson*, for example, the Court explained that there was "nothing approaching . . . a constitutional or statutory violation by anyone in the Richmond construction industry." *Id.* at 500.

Second, the government must show that the classification remedies discrimination that was committed both *within that jurisdiction*, and *within the industry or field* in which the

[11] Any legislative or executive findings must be strictly scrutinized, for "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 501.

classification is imposed (such as school segregation in a district). *Id.* at 500, 504-05. The Court explained the point in *Croson*: "The 'evidence' relied upon by the dissent, the history of school desegregation in Richmond . . . does little to define the scope of any injury to *minority contractors in Richmond* or the necessary remedy." *Id.* at 505 (emphasis added). The Court added that "none of the evidence presented by the city points to any identified discrimination in the *Richmond construction industry*." *Id.* (emphasis added). The Court has "never approved the extrapolation of discrimination in one jurisdiction from the experience of another." *Id.*

Third, the government must show that the racial classification is necessary in the sense that race-neutral remedies have been or would be ineffective in remedying the discrimination. *Adarand*, 515 U.S. at 237-38 (court of appeals "did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was any consideration of the use of race-neutral means") (quotation omitted); *Croson*, 488 U.S. at 507 ("[T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting."); *United States v. Paradise*, 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies."); *id.* at 201 (O'Connor, J., dissenting) ("strict scrutiny requires . . . that the District Court expressly evaluate the available alternative remedies."). The decision in *Croson* illustrated the importance of this requirement: Only in the "*extreme case*" may "some form of narrowly tailored racial preference . . . be *necessary* . . . ." *Croson*, 488 U.S. at 509 (plurality) (emphases added). In *Croson*, the Court stated that a racial set-aside was not necessary because a "race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation" and remedy any discrimination that had occurred. *Id.* at 507.

Fourth, the government must show that it cannot devise an individualized procedure to "tailor remedial relief to those who truly have suffered the effects of prior discrimination" — in other words, that the racial classification is not simply a product of "administrative convenience." *Id.* at 508; *cf. Korematsu*, 323 U.S. at 241 (Murphy, J., dissenting) ("[n]o adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal"). The interest in "avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." *Croson*, 488 U.S. at 508.

Fifth, the government must show that it has minimized harm to innocent members of other racial groups. For this reason, a specific numerical quota, or outright racial exclusion, rarely (if ever) could satisfy the narrow tailoring requirement. *See id.* The Court applied this principle in *Croson*: "Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur . . . enjoys an absolute preference over other citizens based solely on their race. We think it *obvious* that such a program is not narrowly tailored to remedy the effects of prior discrimination." *Id.* (emphasis added); *see also id.* at 515 (Stevens, J., concurring) ("Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause.").

Sixth, the government must show that the racial classification is tailored in terms of duration: that it "will not last longer than the discriminatory effects it is designed to eliminate." *Adarand*, 515 U.S. at 238 (quoting *Fullilove*, 448 U.S. at 513 (Powell, J., concurring)).

C. Hawaii's Racial Voting Qualification Does Not Meet the Requirements of Strict Scrutiny.

Based on the foregoing principles, it is plain that Hawaii's racial voting qualification violates the Equal Protection Clause for any one of a host of alternative and independent reasons.

At the outset, Justice Ginsburg's opinion in *Adarand* identified the simplest reason for holding this racial voting qualification violative of the Equal Protection Clause. As she explained, while this Court has not as yet held that the strict scrutiny standard is automatically fatal for *all* racial classifications, at a minimum "the strict scrutiny standard" is "fatal for classifications burdening groups that have suffered discrimination in our society." *Adarand*, 515 U.S. at 275 (Ginsburg, J., dissenting). The principle identified by Justice Ginsburg applies here. In elections for the Office of Hawaiian Affairs, Hawaii turns away would-be voters who are, for example, African-Americans, Japanese-Americans, Chinese-Americans, Mexican-Americans, and even American Indians — all of whom belong to racial groups whose members "have suffered discrimination in our society" and some of whom have suffered discrimination *in Hawaii*. As Justice Ginsburg rightly suggested, therefore, the strict scrutiny analysis is "fatal" to Hawaii's racial voting qualification, and no further equal protection analysis is necessary.

Apart from that threshold point, the racial classification here fails to meet *any* of the specific requirements (much less all of them) that the government must meet in order to show that a racial classification is necessary and narrowly tailored to serve a compelling governmental interest.

First, Hawaii has not shown that its racial voting qualification remedies prior discrimination. In particular, Hawaii has not identified any competent judicial, legislative, or administrative findings of constitutional or statutory violations by any party to justify its racial voting qualification.

Second, and as a necessary consequence of the first point, Hawaii obviously has not shown that its racial voting qualification remedies a prior denial or infringement of the ability of Hawaiians *to vote in Hawaii*. Hawaii's racial classification thus fails to meet a critical requirement under this Court's equal protection jurisprudence for a racial classification — that it serve a compelling governmental interest in remedying prior discrimination *in the jurisdiction and field* in which the classification is imposed.

Third, even had the State shown prior abridgements on the ability of Hawaiians to vote, it has not shown that a race-based voting scheme is necessary to remedy that discrimination. Indeed, an outright denial of the right to vote on the basis of race can *never* be sufficiently necessary to remedy past discrimination in voting. To be sure, there is a compelling governmental interest in remedying prior racial restrictions on the right to vote, but the constitutionally authorized remedy is imposition of a race-neutral voting scheme (and, if needed, the elimination of various race-neutral voting devices that can be a pretext for racial discrimination). *See, e.g.*, 42 U.S.C. § 1973; *Fullilove*, 448 U.S. at 546-47 (Stevens, J., dissenting) (Voting Rights Act, if it required that 10% of elected officials be minorities, "would merely create the kind of inequality that an impartial sovereign cannot tolerate"); *cf. Bazemore v. Friday*, 478 U.S. 385, 407-09 (1986) (race-neutral admissions policy is constitutionally proper remedy for club's prior discriminatory admissions). In this regard, we cannot improve upon Judge Wisdom: "If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth." *Anderson*, 206 F. Supp. at 705 (Wisdom, J., dissenting).

Fourth, even assuming prior denials of the right to vote, Hawaii has not shown that it is unable to devise an individualized procedure to "tailor relief to those who truly have suffered the effects" of any prior voting discrimination — in other words, to show that the racial classification is not simply a product of "administrative convenience" in grouping together all Hawaiians. *Cf. Croson*, 488 U.S. at 508.

Fifth, Hawaii has imposed a 100% racial voting set-aside in OHA elections that absolutely excludes members of races other than Hawaiian from the ballot. Faced with a 30% set-aside in *Croson*, the Court found "it *obvious* that such a program [wa]s not narrowly tailored to remedy the effects of prior discrimination." *Id.* at 508 (emphasis added). Given Hawaii's 100% exclusion of individuals who are not Hawaiian from the ballot in OHA elections (particularly when combined with the lack of findings of prior discrimination), the same conclusion applies here *a fortiori*.

Sixth, Hawaii's racial qualification is not limited in time. The State established it in 1978, and it is scheduled to last indefinitely. This qualification is not tailored "such that it will not last longer than the discriminatory effects it is designed to eliminate." *Adarand*, 515 U.S. at 238 (quotation omitted).

In sum, Hawaii's law satisfies none of the requirements this Court has imposed for holding a racial classification permissible under the Equal Protection Clause.

D. Hawaii's Arguments Based on Preserving the Culture of Hawaiians and on a Trust Relationship With Hawaiians Do Not Justify Hawaii's Racial Voting Qualification.

The State has constructed a tortured defense of its racial voting qualification that links (a) the *racial* restriction on the beneficiaries of OHA-controlled funds, (b) the *racial* qualifications to be an OHA officer, and (c) the *racial* qualifications for voting in elections for OHA officers. To begin with, this defense does not purport to meet the requirements this Court has imposed for racial classifications.

Even addressing the State's argument on its own terms, moreover, the short answer to it is fairly simple: Three blatant

constitutional wrongs do not make a right. A massive unconstitutional scheme of racially restricted distribution of state funds, racial restrictions on serving in the state office that oversees and distributes those funds, and racially restricted elections to that office hardly makes the State's voting restriction *more* constitutionally palatable. *See* Stuart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 594 (1996) ("It seems unlikely that many, if any, of Hawaii's current programs singling out Native Hawaiians could meet [strict scrutiny] standards. The compelling interest requirement alone would pose an enormous hurdle.").

Hawaii has suggested that the racial voting qualification is constitutional because the racial restriction on the use of the OHA-controlled funds is constitutional and is not challenged here. As a matter of logic, that conclusion makes no sense even if the premise is accepted. If a state refused to hire a black teacher for an all-white school in 1952 because of his race, it could not have defended against a claimed equal protection violation by saying that the racial restriction on hiring was constitutional because the racially segregated schools were not challenged and had not yet been declared unconstitutional.

In addition, the racial restriction on the use of funds is itself unnecessary and not narrowly tailored to serve a compelling interest. Even assuming, for example, that the average Hawaiian suffers poverty to a greater extent than the average individual of another race, the State can institute a race-neutral social welfare program. It cannot engage, however, in a racially restricted distribution of funds that is both over-inclusive and under-inclusive.

Even if the State had a justification to pay monies to members of a racial group because of their race, a state does not have a compelling interest in establishing a racially restricted office *whose members are elected in racially restricted elections* in order to administer the program. In that regard, it

bears emphasis that a racial *voting* qualification is perhaps the most pernicious of all racial classifications because it implies that "individuals of the same race share a single political interest. The view that they do is based on the demeaning notion that members of the defined racial groups ascribe to certain minority views that must be different from those of other citizens." *Miller*, 515 U.S. at 914 (quotation omitted). This is the "precise use of race as a proxy the Constitution prohibits." *Id.; cf. Powers*, 499 U.S. at 410. Here, only by assuming that *all* Hawaiians think differently and vote differently from *all* other Hawaiian citizens can the categorical racial voting qualification be explained. Such an offensive assumption is patently unconstitutional under this Court's precedent.

Hawaii has invoked the term "trust" to describe its scheme and the term "trust lands" to describe lands transferred to the State by the 1959 Admission Act. But the terminology is simply camouflage for Hawaii's 1978 decision that certain state funds (derived both from the state lands and from other state funds) will be used to benefit a racially defined group — even though the State is free to use those funds in a race-neutral way.[12] In any event, the existence of trust lands does not justify a racial qualification *to vote* in *state* elections for the *state* office that oversees and administers the lands.

Hawaii also has explained — correctly — that Hawaiians share a common heritage and background that they, like many Americans of all backgrounds, cherish and celebrate. But the State has no right to engage in a racially restricted distribution of state funds, or racial classifications on the right to vote in a

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[12] Even were the State compelled by federal law to impose a racial classification (which it is not), *Adarand* establishes that the constitutional analysis would remain the same.

state election, simply to preserve a particular "culture."[13] As Justice Kennedy has explained, "There is more than a fine line, however, between the voluntary association that leads to a political community . . . and the forced separation that occurs when the government draws explicit political boundaries . . . ." *Kiryas Joel*, 512 U.S. at 730 (Kennedy, J., concurring in judgment).

The dangers of allowing a state's cultural justifications to supersede the limitations of the Equal Protection Clause are quite evident: One need only change the state from Hawaii to Louisiana and the year from 1999 to 1896. *See Plessy*, 163 U.S. at 550 (legislature is free "to act with reference to the established usages, customs, and traditions of the people"). This Court has forbidden that kind of "cultural" justification for racial classifications in cases ranging from *Brown v. Board of Education* to *Loving v. Virginia*. Now is no time to return to an era when "cultural" justifications could trump the dictates of the Equal Protection Clause. *Cf. Loving*, 388 U.S. at 11 (ban on interracial marriage designed to "maintain White Supremacy").

E. Hawaii's Analogy of Hawaiians to American Indian Tribes Is Historically, Legally, and Factually Flawed.

The lower courts suggested that American Indian tribes are exempt from the Equal Protection Clause (at least, treatment of Indian tribes that facilitates self-government is exempt), and that Hawaiians as a group are sufficiently similar to American Indian tribes that discrimination in favor of Hawaiians can be

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[13] As two leading political and social commentators said of Hawaii: "It is one thing to celebrate a cultural heritage and a sometimes tragic history, but it is another, as Canadians have learned, to widen splits and schisms in a state that more than almost any place in the world has proved that diverse people can live amicably and successfully together." Michael Barone & Grant Ujifusa, *The Almanac of American Politics* 439 (1998).

permitted under the Equal Protection Clause. *See, e.g.*, Pet. App. 13a-14a, 17a.

This argument is flawed at every turn. To begin with, it misconceives the basis for differential treatment of American Indian tribes under the Constitution. And it simultaneously creates from whole cloth a constitutional authorization for members of other racial and ethnic groups (for example, African-Americans, Latino-Americans, and Korean-Americans) to assert *ipse dixit* that they are "similar to American Indian tribes" for purposes of equal protection analysis.

1. American Indian tribes are a distinctive category in our law. *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). The tribes are separate sovereigns within the United States — and have been so considered since before the Constitution was ratified. The Commerce Clause thus provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. i, § 8. In addition, the Treaty Clause, which grants the President "Power, by and with the Advice and Consent of the Senate, to make Treaties," has been a source of authority for the federal government to deal with American Indian tribes as sovereigns. U.S. Const. art. ii, § 2.

As mandated by the Constitution, this Court has drawn a clear constitutional distinction between (a) laws that benefit or burden Indian *tribes* (or *tribal members*) with respect to self-governance or activities on or near an Indian reservation and (b) laws that burden or benefit Indians solely *because of their race* and do not relate to tribal activities (in which case, American Indians are treated like members of other races).

Equal protection strict scrutiny thus applies to classifications by race of individuals who happen to be American Indian so long as the classification in question does not relate to their tribal membership and their activities on or near the reservation. In both *Adarand* and *Croson*, for

example, the Court held that a racial preference program that gave preferences to American Indians, as well as members of other racial groups, was subject to strict scrutiny. As the Court stated in *Croson*, "[t]here is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, *Indian*, Eskimo, or Aleut persons." 488 U.S. at 506 (emphasis added). In *Adarand* as well, the program provided a preference for "Native Americans," but the Court held that *all* racial classifications are subject to strict scrutiny. (In dissent, Justice Stevens raised the subject of American Indians, 515 U.S. at 244-45 n.3, but the Court did not distinguish American Indians from the other racial groups.) So, too, in both *Fullilove* and *Metro Broadcasting*, the laws at issue gave a preference to American Indians, *see Metro Broadcasting*, 497 U.S. at 553 n.1; *Fullilove*, 448 U.S. at 454, but no member of this Court suggested that a racial preference for African-Americans is more strictly scrutinized than a preference for American Indians.

2. In holding Hawaii's special treatment of Hawaiians consistent with the Equal Protection Clause, the courts below erroneously relied in part on this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974). In that case, the Court upheld a hiring preference granted to tribal Indians for employment in the Bureau of Indian Affairs.

Three points about *Mancari* are critical, however, and completely undercut the lower courts' reliance on it. *First*, the Court in *Mancari* stated that the justification for differential treatment for Indian tribes stemmed not from some idiosyncratic ordering of different racial groups, but "from the Constitution itself" – namely, the Indian Commerce Clause and the Treaty Clause. *Id.* at 552; *see also Adarand*, 515 U.S. at 244-45 n.3 (Stevens, J., dissenting) (*Mancari* relied in part on "plenary power of Congress to legislate on behalf of Indian tribes"); *United States v. Antelope*, 430 U.S. 641, 646 (1977) (*Mancari* "involved preferences . . . directly promoting Indian

interests in self-government. . . . Federal regulation of Indian tribes . . . is governance of once-sovereign political communities; *it is not to be viewed as legislation of a 'racial' group consisting of Indians.*") (quotation omitted; emphasis added). So, too, the government's brief in *Mancari*, advocating the position that the Court adopted, cautioned that the Constitution "permits special arrangements [with respect to Indian tribes] *that might not be appropriate with respect to other groups*." Br. for Appellants, No. 73-362, at 33 (emphasis added). By linking its decision to the Indian Commerce Clause, the Court accepted that argument. The Court did not adopt, by contrast, the suggestion of an amicus curiae who argued that *benign* racial preferences are not subject to strict scrutiny, and that preferences to "members of a minority group" such as American Indians "are constitutional." Br. for Amicus Curiae Mexican American Legal Defense and Educational Fund, Nos. 73-362, 73-364, at 22-23.

Second, consistent with its view of the proper scope of the equal protection exception for Indian tribes embodied in the Indian Commerce and Treaty Clauses, the *Mancari* Court went out of its way to make clear that the BIA preference applied only to Indians who were members of Indian tribes and thus "operate[d] to exclude many individuals who are racially to be classified as Indians." *Mancari*, 417 U.S. at 554 n.24. In particular, the Court relied on the definition of Indian used in BIA regulations, which expressly conditioned the preference on tribal membership. *Id.*; *see* Benjamin, 106 Yale L.J. at 612 n.38 ("One of the most important aspects of the Court's conclusion was left unstated: The Court ignored the statutory definition of 'Indian' and looked only to the BIA regulation's definition."); *see also id.* at n.121. The government stressed at oral argument, moreover, that the "preference is limited to Indians who are members of federally recognized [tribes]." Tr. of Oral Arg., Nos. 73-362, 73-364, at 7. The government pointed out that members of terminated tribes or never-recognized tribes were not eligible for the preference and noted

that "there are many Indians, many people who racially could be considered an Indian who don't get this preference." *Id.* at 13.

Third, the Court treated the preference as an aspect of constitutionally authorized Indian self-governance. *See* 417 U.S. at 553 (preference provision designed to give "Indians a greater control of their own destinies"). Indeed, as the government pointed out at argument, some 11,500 BIA employees out of approximately 14,000 at the time worked on the reservations. Tr. of Oral Arg. at 5-6. Moreover, the preference had actually begun as a substitute for a proposal to provide Indian tribes an absolute veto over any person the BIA proposed to send to work on the reservation. *Id.* at 12. The Court took all of that into account, noting that an "obviously more difficult question . . . would be presented" by a general Indian preference in government employment. 417 U.S. at 554.[14]

In reaching its conclusion, the Court stated that the BIA classification was not "in this sense" a "racial" preference. *Id.* at 553 & n.24. By that, the Court clearly meant that a classification involving Indian tribes (or involving Indian tribal members engaged in activities of self-governance or activities on or near a reservation) must be analyzed differently from purely racial classifications.

Mancari is thus simply another in the line of cases in which the Court has held that "the unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation *that*

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[14] That "question," which was unanswered at the time, was whether the same level of scrutiny afforded racial discrimination *against* minorities would apply to racial preferences *for* minorities — a question before the Court that Term, *Defunis v. Odegaard*, 416 U.S. 312 (1974), and which was subsequently addressed in cases such as *Bakke*, *Fullilove*, *Croson*, and *Adarand*.

might otherwise be constitutionally offensive." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) (quotation omitted; emphasis added).

3. Hawaii's attempts to analogize Hawaiians to Indian tribes for purposes of this case are unavailing for two main reasons.

First, the Constitution does not contain a Hawaiian Commerce Clause, but only an Indian Commerce Clause. Pet. App. 14a. Under the Constitution, therefore, a state's differential treatment of Hawaiians is no more acceptable than a state's differential treatment of Croatian-Americans or African-Americans or Italian-Americans.

Second, Hawaiians are not a federally recognized Indian tribe such that Hawaiians could receive the same treatment as American Indian tribes under the Constitution. Since the annexation in 1898, the United States has not dealt with Hawaiians as a sovereign nation. To be sure, certain federal statutes refer to Hawaiians, just as certain statutes refer to African-Americans, but Congress has never established that Hawaiians are an Indian tribe. This is not a trivial point. Without such recognition, a group of people united by race or ethnicity is not entitled to the same treatment as an American Indian *tribe*. As the BIA puts it, express federal recognition as a tribe is a "prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. § 83.2; *see* Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 Wash. L. Rev. 209, 215-16 (1991).

As a matter of law and tradition, moreover, federal courts do not grant tribal status that neither Congress nor the Executive has granted. *United States v. Holliday*, 70 U.S. 407, 419 (1865); *see Cherokee Nation of Okla. v. Babbitt*, 117 F.3d

1489, 1496 (D.C. Cir. 1997). Therefore, this Court cannot simply declare that Hawaiians are an American Indian tribe.

Indeed, the constitutional constraints on Congress and the Executive in recognizing tribes, as well as existing BIA regulations, establish that Hawaiians could not possibly qualify as a tribe. *See* 25 C.F.R. § 83; *Price v. Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985) (group of Hawaiians not a tribe and thus could not sue under jurisdictional statute granting Indian tribes right to sue); Benjamin, 106 Yale L.J. at 574, 576 ("Native Hawaiians are not organized into any entity that can reasonably be called a tribe" and "there is little reason to suppose that Native Hawaiians would satisfy any definition of 'Indian tribe' . . . ."). Even the courts below recognized that Hawaiians have not and could not at this time receive formal recognition as an Indian tribe. Pet. App. 14a.

In any event, even were Hawaiians a recognized Indian tribe, the OHA's racial restriction on voting in elections for a *state* government office dealing with such an "Indian tribe" would still be unconstitutional. The "unique legal status of Indian tribes under federal law permits the *Federal Government* to enact legislation singling out tribal Indians, . . . [but] *States do not enjoy the same unique relationship with Indians* . . . ." *Yakima Nation*, 439 U.S. at 500-01 (quotation omitted; emphases added).

For all of these reasons, the State's attempt to analogize Hawaiians to American Indians does not justify its racial voting qualification in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

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MAY 27, 1999